ORIGINAL

No. 90-6835

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TERRENCE A. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether two police officers possessed reasonable suspicion to suspect that petitioner and his companion were drug couriers at the time the officers asked petitioner and his companion to stop.

2. Whether the court of appeals correctly applied the clearly erroneous standard of review in upholding the district court's determination that petitioner's arrest was supported by probable cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the judgment is noted at 916 F.2d 714 (Table). The opinion of the district court denying the motion to suppress (Pet. App. 1c-12c) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1990. The petition for a writ of certiorari was filed on January 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed (Pet. App. 1a-8a).

1. The evidence is summarized in the opinion of the court of appeals and in the order of the district court denying petitioner's motion to suppress. On April 17, 1989, two Cleveland police detectives were conducting surveillance at the Greyhound bus station. They watched as the 8:15 p.m. bus arrived from Detroit and about 20 to 30 people disembarked, including petitioner and two other young men. Pet. App. 3a, 1c-2c. Based on their experience, the detectives knew that drug couriers often use the bus from Detroit to Cleveland and that they arrive primarily on the last three buses from Detroit, including the 8:15 p.m. bus. Couriers are generally young, are not usually met in the bus station by anyone appearing to be a friend or relation, and they seldom carry any luggage. They usually meet someone outside the terminal in a waiting car or taxi. Id. at 3a, 2c-3c.

The detectives noticed that the three young men they saw leaving the 8:15 bus were not greeted by anyone, and that two of the three men had no luggage while the third man carried only a small gym bag. The officers watched the three men leave the station. The man carrying the gym bag walked away, while

petitioner and the other man stopped at a car parked outside the bus station in which two people were seated. After petitioner and the other man noticed the officers watching them, they left the car and continued walking down the street. The officers followed the two men, who continually looked over their shoulders at the officers. When the two young men started running, the officers shouted at them to stop and identified themselves as police officers. Pet. App. 3a, 3c-4c.

The two men did not respond to the officers' request to stop, but instead separated. The detectives also split up and each one pursued one of the fleeing men. As he started running, petitioner's companion "took a plastic bag out of his pocket, which appeared to contain crack cocaine, and tore it open with his teeth in an effort to dissipate the contents." Pet. App. 3a. Petitioner was apprehended and arrested, but his companion was not. Id. at 3a, 4c.

At the police station, a bag containing 88.63 grams of crack was found in petitioner's pocket. Petitioner admitted that he had come from Detroit to Cleveland to sell the crack. Pet. App. 3a-4a, 5c.

2. The district court denied petitioner's motion to suppress. The court found that "the flight in response to the request" to stop, coupled with the other factors that made the officers suspicious, "provided the detectives with reasonable suspicion to make a Terry stop." Pet. App. 10c. That reasonable suspicion, the court added, "rip[]ened into probable cause to make a

warrantless arrest when the officers witnessed the traveling companion's attempt to destroy the cocaine." Id. at 11c.

3. The court of appeals affirmed. It first concluded that the police had reasonable suspicion to stop petitioner and his companion before they started to chase them: "The police knew from past experience that Detroit was a source city and that drug couriers frequently travelled by bus between Detroit and Cleveland. They further knew that the couriers, more often than not, were young black males who arrived without luggage and were not met by anyone. This, coupled with the fact that the defendant and his companion were alert to surveillance and immediately fled when plainclothes officers approached, provided sufficient reasonable suspicion to make a Terry stop." Pet. App. 7a.

The court went on to find that the officers had probable cause to arrest petitioner at the time that they apprehended him. In making that determination, the court noted that it had "previously held that '[t]he district court's determination that probable cause existed to . . . arrest . . . must be accepted unless it is clearly erroneous.' United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983) (citations omitted)." Pet. App. 7a. The court said that it viewed "the issue as a close one," but could not "say the conclusion of the district court was clearly erroneous." Ibid.

ARGUMENT

1. Petitioner first contends (Pet. 4-5) that this case presents the question left unanswered in Michigan v. Chesternut, 486 U.S. 567 (1988) -- whether a seizure occurs when police

officers command someone to halt and then pursue him, even though the person has not been physically restrained. In Chesternut this Court held that police officers did not seize a suspect by pursuing him in a car without commanding him to halt or turning on the car's siren. Id. at 574-576. The Court left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." Id. at 575-576 n.9. That question is presented in a case now pending before the Court, California v. Hodari D., No. 89-1632 (argued Jan. 14, 1991), where the issue is whether a police officer's pursuit of a suspect, who fled at the sight of the officer and discarded some illegal drugs while fleeing, constituted a "seizure" before the suspect was apprehended.

This case does not present the question left unanswered in Chesternut. The court of appeals specifically stated that "[n]ot unlike the Supreme Court in Chesternut, we elect to decide only the case before us." Pet. App. 6a. It went on to hold that "we need not consider the implication of the command to stop and the subsequent pursuit" because the officers had reasonable suspicion to stop petitioner before that point. Id. at 7a. The court of appeals correctly reached that conclusion. Before the officers yelled "stop" and started chasing petitioner and his companion, they knew that the young men had arrived from a source city on a late bus on which drug couriers frequently traveled; that they had no luggage and were not met by anyone in the station; and that they approached a car outside the station, were alert to surveillance,

and walked away from the car when they spotted the officers. At that point, the officers reasonably suspected that petitioner and his companion were drug couriers. Thus, whether petitioner was seized when the officers told him to stop and started running after him is not relevant to the correct determination of this case, since the officers were justified in stopping petitioner at that point. Accordingly, there is no reason to consider the first question presented by petitioner or to hold this case for consideration in light of Hodari D.

2. Petitioner also argues (Pet. 5-7) that the court of appeals erred by applying the "clearly erroneous" standard to the district court's determination that the officers had probable cause to arrest petitioner when he was apprehended. We agree with petitioner that a district court's conclusion that certain facts amount to probable cause is subject to de novo review, but we do not believe that this case is an appropriate one for review by this Court.

The question whether an arrest is supported by probable cause is a mixed question of law and fact, that is, a question "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). Thus, a district court's findings of "historical facts" may be reversed on appeal only where they are found to be "clearly erroneous."

See, e.g., Maine v. Taylor, 477 U.S. 131, 145 (1986). But the review of the district court's application of the legal standard of probable cause to those facts resolves a question of law and on that issue appellate review is not similarly circumscribed. Cf. Ker v. California, 374 U.S. 23, 33-34 (1963) (reasonableness of a search); Miller v. Fenton, 474 U.S. 104, 110, 117 (1985) (voluntariness of a confession).

Several circuits have held that whether particular facts constitute probable cause is a legal issue subject to de novo review by the courts of appeals. See United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990); United States v. Hoyos, 892 F.2d 1387, 1392 (9th Cir. 1989), cert. denied, 111 S. Ct. 80 (1990); United States v. Patino, 862 F.2d 128, 132 (7th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); United States v. Thomas, 835 F.2d 219, 222 (9th Cir. 1987); United States v. Lima, 819 F.2d 687 (7th Cir. 1987); United States v. Alfonso, 759 F.2d 728, 741 (9th Cir. 1985); United States v. McKinney, 758 F.2d 1036, 1042 (5th Cir. 1985); United States v. Freeman, 685 F.2d 942, 948 (5th Cir. 1982). The Sixth Circuit's contrary conclusion in this and in two other cases, United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983), and United States v. Sangineto-Miranda, 859 F.2d 1501, 1508 (6th Cir. 1988), is, we believe, incorrect.[1]

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[1] The Fourth and Eighth Circuits have not clearly adopted either standard of review. In one Fourth Circuit decision, that court reviewed factual determinations under the clearly erroneous test while stating that whether the facts established reasonable suspicion is subject to de novo review. United States v. Gooding, 695 F.2d 78, 82 (1982). But in a subsequent decision, that court stated that the probable cause determination is subject to review

However, we do not believe that review by this Court is warranted. As an initial matter, petitioner did not argue in the court of appeals that the court should review the probable cause finding de novo. Nor did petitioner ask the en banc court to consider the issue. The court of appeals therefore did not reconsider its prior determination that the clearly erroneous standard applied, but merely followed its decision in Pepple. It may be that the Sixth Circuit will reconsider its position if asked to do so in light of the weight of authority supporting the application of the de novo standard.

In addition, review is not warranted because, in our view, the result in this case would be the same under the de novo standard. By the time petitioner was apprehended, the officers not only knew the facts that gave rise to their reasonable suspicion, but also had observed petitioner and his companion flee and refuse to halt

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under the clearly erroneous standard. United States v. Porter, 738 F.2d 622, 624 (1984). The Eighth Circuit also has adopted inconsistent positions on this issue in different cases. On some occasions, that court has stated that a "district court's finding of probable cause for the warrantless arrest of [the defendant] must be upheld unless clearly erroneous." United States v. Wentz, 686 F.2d 652, 656-657 (1982); see United States v. Simpkins, 914 F.2d 1054, 1057 (1990); United States v. Martin, 833 F.2d 752, 754 (1987), cert. denied, 110 S. Ct. 1793 (1990); United States v. Woolbright, 831 F.2d 1390, 1393 (1987); United States v. Love, 815 F.2d 53, 54 (1987), cert. denied, 484 U.S. 861 (1987); United States v. Everroad, 704 F.2d 403, 405 (1983). In other cases, however, the Eighth Circuit has suggested that it reviews a district court's findings of fact for clear error, but undertakes de novo review of the district court's conclusions of law, including its application of the legal standard to the facts. See United States v. Campbell, 843 F.2d 1089, 1092 (1988); United States v. Reiner Ramos, 818 F.2d 1392, 1394 (1987); United States v. Reivich, 793 F.2d 957, 961 (1986); United States v. McGlynn, 671 F.2d 1140, 1143 (1982).

in response to the officers' command. Moreover, the officers saw petitioner's companion tear a plastic bag open while he was fleeing and attempt to discard a substance that appeared to be crack cocaine. Petitioner states that "[m]erely being in the presence of one who commits a crime, even knowing that it is being committed, is not sufficient to charge the observer as a principal." Pet. 7. But petitioner was more than a mere observer, and there was probable cause to arrest him as well as the other man. The police had watched the two men get off the bus together, walk to the car together, walk down the street together, and then flee from the officers at the same time. When one of the two tried to rid himself, while he was fleeing, of a substance that appeared to be crack cocaine, the officers had an adequate basis to believe that both petitioner and his companion were acting in concert to transport and distribute cocaine. See United States v. Patrick, supra, 899 F.2d at 171-172.[2] Thus, under any standard of review the lower courts' conclusion that petitioner's arrest was justified by probable cause was correct.

Furthermore, this is not an appropriate case in which to address the conflict in the circuits because neither party would defend the court of appeals' application of the clearly erroneous standard. We previously acquiesced in the petition for a writ of certiorari in No. 88-6448, Baron v. United States. In that case,

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[2] As this Court has observed, probable cause deals not with certainties, but with probabilities judged according to practical and common sense standards and based on the totality of the circumstances. See United States v. Sokolow, 109 S. Ct. 1581, 1585 (1989); Illinois v. Gates, 462 U.S. 213, 231-232 (1983).

the district court found that the police lacked probable cause to arrest the defendant but the Ninth Circuit, applying the de novo standard, reached the opposite conclusion. Although we stated that the Ninth Circuit correctly had applied the de novo standard, we agreed that review was warranted in light of the conficting decisions of the Sixth Circuit.[3] But this Court denied the petition in Baron. 490 U.S. 1040 (1989). Although resolution of the conflict will be warranted if the Sixth Circuit continues to apply the clearly erroneous standard, if the conflict persists this Court should decide the issue in a case in which the parties will make opposing arguments on the legal issue presented. Thus, the Court should wait for another case like Baron where the defendant argues in favor of the application of the clearly erroneous standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

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[3] Despite our position in Baron, the United States Attorney, relying on Sixth Circuit precedent, noted in his brief in this case that the district court's finding of probable cause was subject to review under the clearly erroneous standard. Gov't C.A. Br. 12.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on March 21, 1991.

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March 21, 1991

1056